confined to questioning a witness called by the adverse party.

The general rule of English law was and is that a witness may not be discredited by the party producing him. As an exception to the general rule, section 157 Cap. 54 in Sarawak and section 3 of the Criminal Procedure Act, 1865, in England lay down ways in which such a witness may be discredited. The question which does need answering is limited to how, and how far, may examination-in-chief of a witness be conducted in the manner of cross-examination.

To start with, this witness may be asked questions in the nature of cross-examination by the party calling him only if he proves adverse to that party. The judge must first rule whether he is adverse. Suppose he is ruled adverse, the next part of the question is "To what extent may the witness be adversely questioned?" Both in England and in Sarawak, such questioning is limited to his own previous statements oral or written. Supposing that a previous statement is oral, counsel mentions the particular occasion to the witness, and asks whether or not he made such a statement. If the witness says "No", then counsel, if the court rules the witness adverse, may call the person to whom the statement was made.

Suppose, however, that the previous statement is written, and apparently signed by the witness. Counsel will first draw attention to the occasion of the statement. The statement will then normally be passed to the judge to look at, and counsel will ask leave to treat the witness as adverse. If the court gives leave, counsel may question the witness on his statement, which is inconsistent with the evidence given by the witness in court up to this point. The statement will probably be put by counsel to the witness, sentence by sentence. If the witness admits the contents of the statement and his signature, what he says in court becomes part of his evidence. As by this stage the witness has already contradicted himself, his evidence as a whole may be given little weight.

Suppose the witness denies the written statement, and repudiates his signature. Again it may be read out to him and evidence called to show that in fact he did make and sign the statement. Then, however, the content of that statement cannot become positive evidence; it is negative evidence in the sense that it can only be used to destroy or contradict the evidence which went before. In a sense, the previous statement is like an india-rubber — it does not produce written testimony, but merely erases the evidence given in the witness box. The earlier statement cannot be substituted for the evidence in court which is disbelieved.

I deliver this short judgment almost in the form of a practice note for the sake of simplicity. The marginal note to section 157 Cap. 54 reads: "How far witness may be discredited by the party producing". I am fully satisfied that section 157 is meant to lay down certain limits. Section 157, in regard to contradicting your own witness, does clearly direct: "Thus far you may go, and no further."

The question referred to this court arose out of a criminal trial. The rule in civil cases is the same in Sarawak, and was the same in England up to 1938. The judge, however, clearly has a wider discretion to admit statements in civil cases than in criminal cases. In this respect I quote from *Cross* on Evidence, at p. 213:

> "The rule that a previous statement which is contradicted by its maker at the trial cannot be treated as evidence of the facts stated if it does not constitute an admission by a party to the proceedings is generally sound, but circumstances are conceivable in which it should be waived. Suppose, for example, that a quarrel had taken place between a party and his witness after the statement had been made, the statement should sometimes be received as evidence in the case. There is, however, no doubt that this can never be done in criminal proceedings, but it is open to question whether the absolute character of the rule has not been modified by the Evidence Act, 1938, so far as civil suits are concerned."

I need hardly add that the English Act of 1938 does not affect the law in Sarawak. Perhaps it should be stressed that the question put to this court and the answers given are limited to the law as it is in Sarawak.

Question answered.

GURUSAMY v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) December 3, 1964]

[K.L. — Criminal Appeal No. 81 of 1964]

Penal Code, ss. 380 and 411 — Theft and dishonestly retaining stolen property — Evidence.

Evidence Ordinance, 1950, s. 27.

The appellant was charged under section 380 of the Penal Code for the theft of 45 cartons of Scotch Whisky committed in a vessel used for the custody of property some time between December 20 and December 23, 1963; alternatively under section 411, that between the same dates he dishonestly retained such stolen property knowing or having reason to believe them to be stolen property. The evidence showed that he was the wharfman on duty between 7 a.m. to 11 p.m. on December 21 and the vessel which was towed to the wharf in question about 10.45 p.m. on December 20 was discovered missing at 11 a.m. on December 23, i.e. 60 hours later.

The prosecution alleged that the appellant led prosecution witnesses to the place were on the previous day the investigation officer had recovered some of the stolen goods. Then, proceeding further along the beach, he led the detectives into the mangrove where more of the stolen goods were found. In his cross-examination of the prosecution witnesses the appellant challenged their testimony that he led them "into the mangrove and pointed out the stolen property to them". In his own evidence

he stated that he was brought by police launch to the place and by following footprint tracks they came to the spot where the stolen goods were stacked. The learned magistrate held that the appellant as wharfman on duty on December 21, 1963 must have known what happened to the vessel and where the rest of the whisky and other goods were and that therefore he was guilty under the provisions of section 27 of the Evidence Ordinance.

Held: (1) there was no evidence whatsoever on the record to warrant the assumptions made by the magistrate;

(2) evidence of the discovery of the stolen property was admissible without having to invoke section 27 of the Evidence Ordinance, the only purpose of which is to render self-incriminatory statements admissible if such statements can properly be regarded as information relating to the fact thereby discovered. As the appellant was never alleged to have made any statement, negative evidence on this point must necessarily be held in his favour, because had he given any information, such information should have been given in evidence by the police officer who heard it;

(3) all the facts were in favour of the appellant as wholly consistent with his innocence and the appeal should be allowed.

Case referred to:—

(1) *Chadavappa Pujari* v. *Emperor* A.I.R. 1945 Bom 292, 297.

MAGISTRATE'S CRIMINAL APPEAL.

E. J. H. Yong for the appellant.

Nik Saghir bin Mohd. Noor (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was charged in the magistrate's court at Klang, under section 380 of the Penal Code, for theft of 45 cartons of Scotch Whisky committed in a vessel used for the custody of property some time between December 20 and December 23, 1963; alternatively, under section 411 of the Penal Code, that between December 20 and December 24, 1963, in the port area of Port Swettenham he dishonestly retained such stolen property knowing or having reason to believe the same to be stolen property.

The evidence for the prosecution is tenuous in the extreme. On December 20, 1963 at Buoy No. 2, cargo from the "*S. S. Lawmedon*" was discharged into seven lighters, one of which was S. 66, loaded with a considerable quantity of whisky and other goods. This lighter was towed to wharf No. 8 by 10.45 p.m. At 11 a.m. on December 23, 60 hours later, the wharf foreman (P.W.1) discovered the lighter missing. About 4.30 p.m. of the same day it was found by a customs officer (P.W.3) beached near Sungei Udang, about one mile from Carey Island. There was only one carton of whisky left in the vessel. A.S.P. Osman bin Abdul Hamid (P.W.4), who conducted the investigation on December 23, accompanied two detectives to the beach at Sungei Aur, quarter mile from Port Swettenham, to verify certain information given by them and there found a stack of 19 cartons. At 10 a.m. on December 24, he arrested the appellant and, accompanied by the same two detectives, they returned to Sungei Aur in a police launch. The assistant superintendent of police alleged that the appellant led them to the place where he had recovered the 19 cartons the previous day. Then, proceeding farther along the beach for 100 yards, he led the two detectives about 10 yards into the mangrove, where a stack of 45 cartons of whisky was found stacked under tarpaulin — the subject matter of the charge.

The appellant did not have the assistance of counsel at his trial and conducted the defence himself. In his cross-examination of the assistant superintendent of police and the two detectives, however, he clearly had challenged their testimony that he led the detectives into the mangrove and pointed out the stolen property to them. In his own evidence, he stated that he was brought by police launch to Sungei Aur, stopping on the beach at a spot where a stick had been planted. From this marker there were footprints along the beach leading into the mangrove. By following the tracks they came to the spot where the stolen goods were cached under a tarpaulin cover.

Apart from the evidence concerning the discovery of the stolen property, the only other evidence adduced against the appellant was that of P.W.2, the wharf foreman, who stated that from enquiries made by him at the Cargo Handling Corporation he had learnt that the appellant was "booked as a wharfman" on duty at wharf No. 8 from 7 a.m. to 11 p.m. on December 21. All this was of course inadmissible as hearsay evidence. But what is even more surprising is that out of the 60 hours that the lighter S. 66 was at wharf No. 8 before it was missed, the appellant was on duty for only 16 hours of one day, and there was not an iota of evidence that the lighter was not towed away at the other times while the appellant was off duty.

In the result, then, the only evidence, if any, implicating the appellant was his presence when the stolen property was found. Yet the learned magistrate found as a fact that

> "As the wharfman on duty on 21.12.63 he must have known . . . what happened to lighter No. 66 in the course of his duties and as to who took over charge of the lighter and if there were any others involved. He ought to know where was the rest of the whisky and the rest of the other goods between Carey Island and Sungei Aur."

I need hardly observe that there was no evidence whatsoever on the record to warrant those assumptions.

The learned magistrate proceeded to say:

> "Under the circumstances I found accused guilty at least as a member of the gang in respect of P.4 and P.5 (i.e., the stolen property) under the provisions of section 27 of the Evidence Ordinance."

With respect I think he has misunderstood the provisions of section 27, namely:

"When any fact is deposed to as *discovered in consequence of information received* from a person accused of any offence in the custody of a police officer, *so much of such information*, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered *may be proved*."

Section 27 clearly had no application in this case. Evidence of the discovery of the stolen property was admissible without having to invoke the section, the only purpose of which is to render self-incriminatory statements admissible if such statements can properly be regarded as information relating distinctly to the fact thereby discovered. The appellant was never alleged to have made any statement. Hence, negative evidence on this point must necessarily be held in his favour, because had he given any informa tion, such information should have been given in evidence by the police officer who heard it. Moreover, the appellant's evidence went unchallenged, as to his being brought to the beach by the police in their launch (nothing being said about his giving directions where to go), or as to the marker planted on the beach (obviously done by the assistant superintendent of police on the previous afternoon), or as to the tracks leading into the mangrove, which of course meant that no assistance from the appellant was required to lead the police to the whisky. All these facts were in favour of the appellant as wholly consistent with his innocence, but not for a moment was such evidence given even passing consideration. Before I conclude, I think it will be useful to remember the following observations of Divatia J. in *Chadavappa Pujari* v. *Emperor* [1] on section 27 of the Evidence Ordinance:

"In absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from another man's property, would not be sufficient to establish the accused's possession. It may at the most show his knowledge that the property was concealed there. In my view, mere knowledge that stolen property is lying hidden somewhere is not an incriminating circumstance for the offence of theft or receiving stolen property, and such knowledge cannot by itself raise a presumption of possession. It is the prosecution that has to establish accused's possession apart from his knowledge, and it is only when his possession is proved that the accused has to account for it in order to escape from the presumption under Illustration (a) to section 114."

The appeal is allowed, the conviction quashed and the sentence set aside.

Appeal allowed.

Solicitors: *Dato' S. M. Yong & Co.*

WONG CHOP SAOW v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) December 6, 1964]

[Kota Bharu — Criminal Appeal No. 40 of 1964]

Gaming — Evidence — Expert witness — Mode of giving evidence.

To avoid confusion the expert witness should give his evidence as follows: He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. He should then proceed to describe the various documents and give his reasons why in his opinion they relate to characters lottery. The trial magistrate must then come to a finding that he either accepts or rejects the evidence of the expert witness *vis-a-vis* characters lottery.

MAGISTRATE'S CRIMINAL APPEAL.

Isahak bin Abdul Hamid for the appellant.

Tengku Ahmad Rithauddeen bin Tengku Ismail (Deputy Public Prosecutor) for the respondent.

Hashim J.: The appellant was charged under section 4(1)(c) of the Common Gaming Houses Ordinance 1953. He was found guilty, convicted and sentenced to a fine of $2,000 or 6 months imprisonment. He appealed against conviction and sentence.

Inche Isahak for the appellant submitted that the evidence of the expert witness was scanty and not sufficient for the learned magistrate to come to a finding whether the documents found related to 1000 characters lottery. I agree with Inche Isahak that the expert witness could have given his evidence more coherently and I allowed the appeal. However I found that taken as a whole there was sufficient evidence to warrant a retrial and I therefore directed that the case be retried before another magistrate.

May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. He should then proceed to describe the various documents and give his reasons why in his opinion they relate to characters lottery. The trial magistrate must then come to a finding that he either accepts or rejects the evidence of the expert witness *vis-a-vis* characters lottery. In this case the trial magistrate did not come to any finding but merely stated what the expert evidence was.

The appeal is allowed. The conviction and sentence set aside and the case be retried before another magistrate.

Appeal allowed. Re-trial ordered.

Solicitors: *Isahak Hamid & Co.*